

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON MATTHEW GRONDON,

Defendant-Appellant.

UNPUBLISHED
November 9, 2010

No. 292494
Washtenaw Circuit Court
LC No. 08-000161-FC

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, stealing or retaining a financial transaction device without consent, 750.157n(1), illegal use of a financial transaction device, MCL 750.157q, and larceny of less than \$200, MCL 750.356(5). Defendant was sentenced to 34 to 51 years for second-degree murder, 2 to 4 years for illegal use of a financial transaction device, 2 to 4 years for stealing or retaining a financial transaction device without consent, and to 93 days for larceny of less than \$200. We affirm.

Defendant was convicted of murdering his uncle, Robert Green, and of taking and using Green's debit card without consent to make numerous purchases thereafter. A car resembling defendant's car was visible on surveillance video at a gas station at the approximate time that Green's debit card was used to make a purchase there. And, when he was arrested, defendant had dried blood on his pants and on his hands, which DNA analysis later established came from Green. During police questioning, defendant confessed to striking Green in the head repeatedly with a pipe and to disposing of the pipe by throwing it out of his car window while driving away from Green's home.

Defendant first argues that his right against self-incrimination was violated when he confessed to killing Green during a police interrogation. Defendant argues that his confession was involuntary because he (1) was intoxicated on cocaine, (2) was in intense pain before the arrest and during his two subsequent interrogations due to kidney stones and an inability to urinate, (3) was not given medical treatment until after he confessed, and (4) was under the impression that he would not get medical attention until after he confessed. We disagree.

As this Court recently explained in *People v Gipson*, 267 Mich App 261, 264; 787 NW2d 126 (2010).

We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination. *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). But we review a trial court's factual findings for clear error and will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses. *Id.*

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights." *Gipson*, 267 Mich App at 264. "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 264-265. In examining the totality of the circumstances surrounding the interrogation, we consider (1) the duration of the defendant's detention and questioning, (2) the age, education, intelligence, and experience of the defendant, (3) whether there was unnecessary delay of the arraignment, (4) the defendant's mental and physical state, (5) whether the defendant was threatened or abused, (6) any promises of leniency, and (7) whether the defendant was deprived of food, sleep or medical attention. *Sexton*, 461 Mich 753; *Gipson*, 267 Mich App at 265.

Defendant does not dispute that he confessed while in custody and after receiving a Miranda warning.¹ Likewise, he does not dispute that the waiver of his right against self-incrimination was knowing and intelligent. At issue, then, is whether defendant's confession was voluntary.

Contrary to defendant's claims, there was no evidence presented that the police withheld medical treatment in order to force defendant to confess. The videotaped portion of the interview did not show coercive conduct on the part of the police officers, or that defendant made statements in response to coercion. Although contradicted by defendant, Saline Police Department Detective Don Lupi specifically denied telling defendant that he would only receive medical treatment if he answered questions. The fact that police officers asked defendant if he could answer a few more questions before receiving treatment, and that defendant responded affirmatively, weighs heavily against defendant's argument that his statements were involuntary. Moreover, at no time during the interview did defendant indicate that he wanted the interview to stop for any reason. Also, that defendant was able to stand up and demonstrate how he struck Green suggests that his pain was not as severe as he now claims. Finally, although there was evidence that defendant had ingested crack cocaine, that occurred at least 15 hours before the interview at issue. Moreover, drug intoxication is not dispositive on this issue. *Gipson*, 287 Mich App at 265.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Additionally, other factors support the trial court's determination that the confession was voluntary. Defendant had been in custody for less than 15 hours, and the interrogation was short, lasting only 45 minutes. He had committed other offenses and previously served time with the Michigan Department of Corrections, so he was likely familiar with police procedure and techniques. Considering the totality of the circumstances, the trial court did not err in concluding that defendant's statements were made voluntarily. *Sexton*, 461 Mich 753; *Gipson*, 267 Mich App at 265.

Defendant next argues that the prosecutor committed misconduct during her rebuttal closing argument when she interjected her personal beliefs, denigrated the defense, and inflamed the jurors' passions and prejudice against him. These assertions are based on the following comments:

One thing that truly genuinely offended me was any culpability, any responsibility that defense counsel put on Mr. Green. He wasn't taking his meds, really? He was at his own house working on his own car minding his own business when [defendant] went there wanting money. Shame on them. Shame on them. Mr. Green had [sic] nothing that he did that makes him in any way, any possible way, even minutely responsible for what happened that day, nothing.

And you will not hear anything in the instructions that indicates anything to that affect [sic] and that's offensive.

To properly preserve a claim of prosecutorial misconduct, a defendant must make a timely and contemporaneous objection. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the challenged conduct. Therefore, his unpreserved assertion of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *Callon*, 256 Mich at 329. Under this standard, this Court will reverse the jury's verdict only where it determines "that although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). This Court considers issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments. *Thomas*, 260 Mich App at 454. The prosecutor's remarks must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Although the prosecutor's statement that she was "offended" could be considered a personal belief, and her comment that defendant should be ashamed for making a provocation or heat of passion argument could be considered derogatory, viewed in context, the prosecutor's comments were extremely brief, were made only in response to defendant's closing arguments, and were not likely to divert the jury's attention from the evidence presented in this case. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson*, 245 Mich App at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Although passionate, the prosecutor's argument was intended to convey to the jury that there was absolutely no evidence indicating that defendant was provoked by Green or that defendant acted in the heat of passion.

A prosecutor need not present her argument in the blandest of terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Moreover, the trial court instructed the jury several times that they were the sole judges of the evidence and that the attorneys' statements and arguments were not to be considered as evidence. Thus, even if defendant could show that the prosecutor engaged in misconduct that had a prejudicial effect, it was presumably cured by the trial court's instructions. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Hence, there was no plain error.

Defendant's final argument is that the sentencing court erred in scoring OV 7 at 50 points. We disagree. Defendant preserved this issue by presenting specific challenges to the scoring of OV 7 at the sentencing hearing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

"A sentencing court has discretion in determining the number of points to be scored [when calculating the sentencing guidelines], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, we review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). A trial court's scoring decision will be upheld if there is any evidence in support. *Id.* We review issues involving the interpretation or application of the statutory sentencing guidelines de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

OV 7 addresses aggravated physical abuse, and is to be scored at 50 points if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). OV 7 was originally scored at zero points. However, at sentencing, the prosecutor argued that OV 7 should be scored at 50 points based on defendant's conduct:

I would just argue that given the nature of this offense, given the fact that this defendant chased that man around his basement and beat him and beat him and beat him and beat him and that man had to push himself, dragging himself across the floor and he beat him again once he got wedged into a corner, yes, yes OV 7 is properly scored at fifty points.

In response, defendant admitted that this was "a brutal case," but argued that there was no excessive force beyond that necessary to take someone's life, and thus no excessive brutality. The sentencing court agreed with the prosecutor and scored OV 7 at 50 points, stating that "the actual behavior and treatment of [Green] that led to his death could be categorized as nothing other than excessively brutal."

The phrase "excessive brutality" is not statutorily defined. "[W]hen terms are not expressly defined by a statute, a court may consult dictionary definitions." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The primary definition of "brutality" found in *The American Heritage Dictionary of the English Language* (1996) is, "[t]he state or quality of being ruthless, cruel, harsh, or unrelenting." "Excessive" means "[e]xceeding a normal, usual,

reasonable, or proper limit.” *The American Heritage Dictionary of the English Language* (1996). Presuming as axiomatic that in the context of second-degree murder no brutality is properly characterized as reasonable, proper, or normal, excessively brutal conduct is understood to be that which exceeds the norm for second-degree murderers.

The medical examiner testified that Green’s “scalp was split” by five blows with a “linear rod-like object,” possibly a bar or a pipe. Green was also struck across the right eye socket and eyelid and sustained superficial injuries on his lower right leg. Cassin opined that Green died from the multiple blunt force impacts to his head, which caused bleeding on the brain surface and acute swelling of the brain. The medical examiner said that it was “impossible for [him] to say that any one injury did or might have caused this death.” There was also evidence that defendant chased Green around his basement, that Green dragged himself across the basement floor, and that defendant continued to beat Green after he got wedged into a corner.

On appeal, defendant reiterates the argument he made before the sentencing court: that striking Green with a pipe six times is insufficient evidence of excessiveness because the medical evidence indicated that all six strikes were necessary to complete the crime of second-degree murder. Given the medical examiner’s testimony, the premise of defendant’s argument is incorrect. And, considering the additional evidence presented regarding the nature and extent of defendant’s attack on Green, we are satisfied that the sentencing court properly exercised its discretion in concluding that defendant’s severe beating of his uncle with a pipe was excessively brutal. Therefore, a score of 50 points for OV 7 was proper.

We affirm.

/s/ Peter D. O’Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey